IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.77 OF 2005
IN
ARBITRATION PETITION NO.7 OF 2005

Ashok Leyland Finance Ltd. ..Appellant.
(Orig.Petnr.)

Vs.

M/s.Sanatan Transport Co.
Pvt. Ltd. & Anr. ..Respondents.
(Orig.Respdts.)

Ms.Shakuntala Joshi, Advocate for the Appellant.
Mr.R.R.Sharma for the Respondents.

CORAM: A.P.SHAH AND
S.J.VAZIFDAR, JJ.

DATED: 9TH MARCH, 2005

ORAL JUDGMENT : (Per S.J.Vazifdar, J.)

By consent, the Appeal is admitted and taken up for final hearing.

2. The Appeal challenges the order passed by the learned single Judge dated 18.1.2005 rejecting the Appellant's petition under section 9 of the Arbitration and Conciliation Act, 1996. The learned Judge held that the Appellants ought to make an application under section 17 of the said Act before the learned Arbitrator and that it would not be appropriate to entertain the Petition.

3. The facts as regards the transaction are not in dispute. An agreement dated 21.8.2003 was entered into between the Appellant and the Respondents. Under the said agreement, Respondent No.1 was entitled to avail of a Affinity Card Facility from the Appellant which enabled Respondent No.1 to purchase from Bharat Petroleum Corporation Ltd. goods such as diesel, lubricant oils, genuine spares of the Appellant and other utilities by using the said card issued by Bharat Petroleum Corporation Ltd.

Respondent No.2 the Managing Director of Respondent No.1 stood as a guarantor in respect of the dues of Respondent No.1 under the aforesaid credit card facility. Under clause 11 of the agreement, the said vehicle in respect of which interim orders are sought in the above Petition, was hypothecated in favour of the Appellant. Respondent No.1 by letter dated 3.9.2003 addressed to the Divisional Manager, New India Assurance Company requested the company to hypothecate the said vehicle in favour of the Appellant.

4. That Respondent No.1 was issued the said card

and utilised the same is not in dispute. The only dispute is regarding the amount that is now repayable by Respondent No.1 to the Appellant.

5. Mr.Sharma, the learned counsel appearing on behalf of the Respondents submitted that in view of the fact that the proceedings had commenced before the learned arbitrator the application for interim reliefs can only be made before the learned arbitrator under section 17 of the said Act and that the application for interim reliefs is not maintainable before this Court under section 9 of the said Act. The submission is not well founded.

6. Section 9 of the Arbitration and Conciliation Act, 1996 reads as under :

> "9. **Interim measures etc. by Court**.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-
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> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
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> (ii) for an interim measure of protection in respect of any of the following matters,

namely:--

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and

> convenient,
>
> and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

The language of the section is clear. It expressly provides that "A party may,.....during the arbitral proceedings.....apply to a court". The language of this section does not even require any interpretation. It expressly permits a party even during the subsistence of the arbitral proceedings to make an application for interim reliefs of the nature specified therein.

7. The Supreme Court in *Sundaram Finance Ltd. v. NEPC India Ltd. (1992) 2 Supreme Court Cases, 479* considered the question whether an application under section 9 is maintainable where no arbitration proceedings were pending and even before an arbitrator had been appointed. The High Court of Madras observed that no effort at the time of filing of the application under section 9 had been made to have an arbitrator appointed. It was therefore held that the application was misconceived and that the Court had no jurisdiction to entertain such an

application. While dealing with this question, the provisions of section 9 fell for consideration, The Supreme Court while considering this question also held that an application under section 9 could be made even during the arbitral proceedings. The Supreme Court held as under :

> 11. The reading of Section 21 clearly shows that the arbitral proceedings commence on the date on which a request for a dispute to be referred to arbitration is received by the respondent. It is in this context that we have to examine and interpret the expression "before or during arbitral proceedings" occurring in Section 9 of the 1996 Act. We may here observe that though Section 17 gives the Arbitral Tribunal the power to pass orders, the same cannot be enforced as orders of a court. It is for this reason that Section 9 admittedly gives the court power to pass interim orders during the arbitration proceedings.
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> 13. Under the 1996 Act, the court can pass interim orders under Section 9. Arbitral proceedings, as we have seen, commence only when the request to refer the dispute is received by the respondent as per Section 21 of the Act. The material words occurring in Section 9 are "before or during the arbitral proceedings". This clearly contemplates two stages when the court can pass interim orders, i.e., during the arbitral proceedings or before the arbitral proceedings. There is no reason as to why Section 9 of the 1996 Act should not be literally construed. Meaning has to be given to the word

> "before" occurring in the said section. The only interpretation that can be given is that the court can pass interim orders before the commencement of arbitral proceedings. Any other interpretation, like the one given by the High Court, will have the effect of rendering the word "before" in Section 9 as redundant. This is clearly not permissible. Not only does the language warrants such an interpretation but it was necessary to have such a provision in the interest of justice. But for such a provision, no party would have a right to apply for interim measure before notice under Section 21 is received by the respondent. It is not unknown when it becomes difficult to serve the respondents. It was, therefore, necessary that provision was made in the Act which could enable a party to get interim relief urgently in order to protect its interest. Reading the section as a whole it appears to us that the court has jurisdiction to entertain an application under Section 9 either before arbitral proceedings or during arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act. (emphasis supplied)

8. In the circumstances, we reject Mr.Sharma's submission that the application is not maintainable.

9. On merits, as observed earlier, the fact that Respondent No.1 availed the said facility is not in dispute. It is pertinent to note that before the learned Single Judge the Respondents remained

absent. It is also admitted that the vehicle was hypothecated in favour of the Appellant. There is nothing on record to suggest that the Appellant's claim of almost Rs.7,00,000/- is disputed. That however ultimately is a matter for the learned arbitrator to decide.

It is pertinent to note that three cheqeus were issued by Respondent No.1 which were dishonoured. The only contention raised in the affidavit in reply filed on behalf of the Respondents in this Court was that the same were given by way of security with the understanding that the same were not be presented to the bank for encashment. There is nothing on record to substantiate this case. We are not inclined to accept the bare word of the Respondents in this regard.

10. Mrs.Joshi stated that there were several other vehicles also similarly hypothecated in favour of the Appellant in respect of separate facilities granted to the Respondent in which under independent proceedings a Court Receiver had been appointed by this Court. The Appellant was not permitting the Respondent to take possession. These are independent proceedings with which we are strictly

not concerned in the present matter. We enquired from Mr.Sharma whether his client was present in Court and would be willing to make a statement that subject to any orders of this Court in the aforesaid proceedings, the Respondents would cooperate and comply with the orders by permitting the Respondent to take possession of the vehicles as per the orders. He refused to do so. This bold refusal to comply with the orders of this Court exposes the mala-fides of the Respondent.

11. In the circumstances, the following order is passed :

(i) The impugned order is set aside.

(ii) The Court Receiver, High Court, Bombay is appointed as Receiver in respect of the said vehicle referred to at Exhibit "D" to the Petition with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908. The Court Receiver shall however not sell the said vehicle at this stage. The Court Receiver shall appoint Respondent No.1 as his agent on the usual terms and condition including as to payment of royalty and

security.

(iii) In the event of the amount of royalty exceeding the amount due to the Appellant, liberty to the Respondents to apply for discharge of the Receiver.

(iv) There shall be no order as to costs.